

NTSB Order No. EA-5000

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 9th day of October, 2002

Docket SE-16363

Respondent has appealed from the oral initial decision of Administrative Law Judge William A. Pope, II, issued on December 4, 2001, following an evidentiary hearing.<sup>1</sup> The law judge affirmed an order of the Administrator, on finding that respondent had violated 14 C.F.R. sections 91.13(b), 91.127(c), 91.129(a), 91.129(c)(2), 91.129(g)(1), and 91.129(i) of the Federal Aviation Regulations ("FARs," 14 C.F.R. Part 91), but

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reduced the proposed suspension from 180 to 120 days.<sup>2</sup> We deny the appeal.<sup>3</sup>

This case stems from a pilot deviation by respondent while operating an aircraft at the Tupelo, MS Airport on May 24, 2000. The tower at Tupelo is operated by RVA, Inc., a private company, under contract with the FAA. The airspace surrounding the airport is Class D (controlled) while the tower is in operation, i.e., between the hours of 6:00 a.m. and 10:00 p.m., 7 days a week, and Class E (uncontrolled) while it is not in operation. The incident occurred between 6:00 and 7:00 p.m., while the tower was in operation.

Respondent Nix landed at Tupelo at approximately 6:15 p.m., after obtaining clearance for landing from the tower. After refueling and filing an instrument flight plan with the Memphis Center by telephone, respondent claims that he attempted several times unsuccessfully to contact the tower by radio to obtain a departure clearance. Despite this failure to make radio contact or to obtain a clearance, at about 6:50 p.m., respondent taxied his aircraft from the ramp to Runway 18 and onto that active

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<sup>2</sup> Section 91.13(b) prohibits careless or reckless operations that endanger the life or property of another. Section 91.127(c) requires two-way radio contact prior to operating to, from, or on an airport having an operational control tower. Sections 91.129(a), (c)(2), (g)(1), and (i) generally require compliance with air traffic control instructions, procedures, and regulations when operating within Class D airspace, and require a clearance for operating at any airport with an operating control tower.

<sup>3</sup> The Administrator did not appeal the sanction reduction.

runway. As he was entering the runway, another aircraft, which had received clearance to land, was approaching from approximately one mile away. The controller had to instruct that aircraft to go around. Only then, after hearing radio instructions from the tower to this diverted aircraft, did respondent establish contact with the tower.

The law judge, as an initial matter, found that respondent's claim of unanticipated, but not repeated, radio failure during the 35-minute period between his landing and the time of the incident not to be credible. The law judge further found that, even if respondent did attempt to contact the tower, his failure to make contact would not have given him a green light to enter an active runway because he had an unconditional obligation to establish two-way contact. Moreover, the law judge noted that respondent failed to take any additional steps to establish contact. The law judge concluded that, in light of these violations of the FARs and of respondent's prior violations resulting in certificate suspensions, a 120-day sanction should be imposed.

On appeal, respondent contends that his conduct was not careless or reckless in violation of section 91.13(b). It is well established, however, that a violation of an operational FAR is sufficient in and of itself to support a residual violation of section 91.13(b). See Administrator v. Pritchett, 7 NTSB 784 (1991). Moreover, as the law judge pointed out, respondent operated his aircraft on the taxiway and runway of Tupelo Airport

without establishing two-way radio communication and obtaining a clearance, and without taking any reasonable steps to determine why he could not contact the tower. Even if he did have a radio problem, his obligation to make two-way radio contact was unconditional. Administrator v. Berg, NTSB Order No. EA-3564 (1992).

Next, respondent contends that the law judge erred by failing to consider evidence that the tower was "possibly unmanned" when respondent attempted to contact it. We find this argument to be unpersuasive for a number of reasons. First, the notion that the tower was in fact unmanned at the time of the incident is entirely unsupported in the record. Mr. Parnell, the air traffic controller on duty at the time, testified that the tower was open during the entire time of this event, and respondent submitted no evidence to rebut this. Even respondent's own witness, Edward Edmundson (whose aircraft was forced to abort his landing because of respondent's actions), testified that he had no difficulty establishing contact with the tower at the time surrounding the incident.<sup>4</sup>

Second, even if respondent did have a subjective belief that the tower was closed (based on his uncorroborated contentions that the window shades in the tower were drawn and that the tower would not answer his radio calls), that did not excuse him from

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<sup>4</sup> Mr. Edmundson also testified that he did not hear any radio communications from respondent to the tower. No such attempted communications were present on the tower's tape either.

taking additional actions (such as calling the tower on a land line) to determine whether his belief was correct.

Third, under the circumstances of this case, respondent did not have a reasonable basis to believe that the tower was in fact closed. It is undisputed that respondent made frequent use of this airport, and he should have been familiar with the tower's hours of operation. When he landed at the airport just 35 minutes before the deviation incident, the tower was open, and he was able to establish two-way radio contact and receive appropriate clearance without any difficulty. There was nothing sufficient to indicate that the tower was suddenly closed during the brief time it took respondent to refuel and telephone in his flight plans. To the contrary, the evidence indicates that the airport was very active at this time, with several aircraft landing, which would make any sudden, unscheduled tower closing extremely dubious. Respondent himself noted that a black pickup truck was parked at the base of the tower, which could have belonged to the controller. All of these circumstances required that respondent inquire further before proceeding.

Respondent argues that the sanction should have been reduced because his unauthorized entry onto the runway posed no real threat to other aircraft. But real danger need not be proven to support a residual violation of section 91.13(b). And the facts here would support an independent carelessness finding because respondent's action required another aircraft that had already been cleared for landing to go around.

Finally, we find respondent's claim that the 120-day sanction imposed by the law judge was excessive to be unpersuasive as well. As the law judge noted, the range of sanctions imposed by the Safety Board for similar violations is great. Transcript at 271. Given the compliance history of respondent, three suspensions for various violations of the FARs in his capacity both as a pilot and as a mechanic, the law judge found that a suspension of 120 days should be imposed. In imposing a 120-day sanction, the law judge relied upon Administrator v. DeFelice, NTSB Order No. EA-3874 (1993). In that case, as well as this one, the pilot had a prior history of violations of the FARs. Respondent in DeFelice attempted three or four times to obtain clearance from the tower, and mistakenly believed he had received clearance to take off. Here, respondent claims that he proceeded on the (mistaken) belief that the tower was closed. The problem here, as in DeFelice, was that respondent had no adequate basis for his belief. A key difference, however, and one that makes the carelessness in this case arguably more egregious, is that respondent's asserted mistake flowed from his failure to acquire readily available information he *chose* not to pursue, perhaps because it would not have been convenient to do so, rather than from an inadvertent perceptual error resulting from a lack of sufficient attention.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied<sup>5</sup>; and
2. The 120-day suspension of respondent's certificate shall begin 30 days after the service date indicated on this opinion and order.<sup>6</sup>

CARMODY, Acting Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

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<sup>5</sup> The rebuttal brief respondent submitted without first seeking leave of the Board (see Section 821.48(e)) has not been considered and is hereby dismissed.

<sup>6</sup> For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(f).